

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DIRECTV, INC., a )  
California corporation, )  
Plaintiff, ) No. C03-4176 BZ  
v. )  
GRIGORY GROSMAN, et al., )  
Defendants. )  
\_\_\_\_\_  
REPORT AND RECOMMENDATION  
RE: PLAINTIFF'S MOTION FOR  
DEFAULT JUDGMENT AGAINST  
DEFENDANT GROSMAN

Before me is plaintiff DIRECTV's motion for default judgment against defendant Grigory Grosman.<sup>1</sup> A hearing was held on February 2, 2005. Defendant did not file any opposition to plaintiff's motion, nor did he appear at the hearing. As defendant has not consented to the jurisdiction of a United States Magistrate Judge, this matter will be reassigned to a district judge with the following report and recommendation regarding default judgment.

On September 12, 2003, plaintiff filed this action

<sup>1</sup> All co-defendants have been dismissed.

1 against defendant and two other individuals alleging  
2 violations of the Federal Communications Act of 1934, as  
3 amended, 47 U.S.C. section 605, as well as the Electronic  
4 Communications Privacy Act ("ECPA"), 18 U.S.C. sections  
5 2510-2521. Plaintiff effected service of process against  
6 defendant Grosman on November 28, 2003. After defendant  
7 failed to respond to the complaint, and upon plaintiff's  
8 request, the Clerk of this court entered his default under  
9 Rule 55(a) on January 27, 2004. On February 26, 2004,  
10 Chief Judge Patel issued an Order of Limited Assignment of  
11 all DIRECTV cases pending in the Northern District to Judge  
12 Ware. See February 26, 2004 Order. Pursuant to Chief  
13 Judge Patel's Order, I issued a stay in all DIRECTV cases  
14 assigned to me, which stay was lifted upon issuance of  
15 Judge Ware's Order Regarding Limited Assignment to  
16 Determine Issues Regarding Joinder of Defendants and  
17 Showing Needed to Establish a *Prima Facie* Case Under  
18 Statutory Claims. In re DIRECTV, Inc., No. C-02-5912-JW,  
19 2004 WL 2645971 (N.D. Cal. July 26, 2004). Defendant  
20 failed to appear at the August 30, 2004 status conference.  
21 On November 10, 2004 plaintiff filed a motion for default  
22 judgment against defendant.

23 Pursuant to Rule 55(b)(2), a court may enter default  
24 judgment against a party when default has already been  
25 entered by the Clerk. Fed. R. Civ. P. 55(b)(2). A court  
26 may not enter a default judgment against an unrepresented  
27 minor, an incompetent person, or a person in military  
28 service. See Fed. R. Civ. P. 55(b)(2); 50 App. U.S.C. §

1 521. The defendant satisfies this requirement. See  
2 Declaration of Kimberly R. Colombo in Support of Plaintiff  
3 DIRECTV, Inc.'s Motion for Default Judgment Against  
4 Defendant Grigory Grosman ¶ 8.

5 By his default, defendant is deemed to have admitted  
6 the well-pleaded averments of the complaint except for  
7 those regarding the amount of damages. Fed. R. Civ. P.  
8 8(d); TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915,  
9 917-18 (9th Cir. 1987).

10 Plaintiff seeks statutory damages against defendant  
11 for violation of 18 U.S.C. section 2511(1)(a). Section  
12 2511(1)(a) of the ECPA provides that "any person who  
13 intentionally intercepts, endeavors to intercept, or  
14 procures any other person to intercept or endeavor to  
15 intercept, any wire, oral, or electronic communication . .  
16 . " commits a federal offense. 18 U.S.C. § 2511. Section  
17 2520(a) creates a private right of action for any person,  
18 including a corporation, "whose wire, oral, or electronic  
19 communication is intercepted." 18 U.S.C. §§ 2510(6),  
20 2520(a). Ninth Circuit case law holds that satellite  
21 transmissions are electronic communications protected under  
22 the ECPA. U.S. v. Lande, 968 F.2d 907, 909 -10 (9th Cir.  
23 1992) ("A person who views satellite television programming  
24 by use of a modified descrambler and a satellite dish  
25 'intentionally intercepts' the satellite television signal,  
26 which is an 'electronic communication.'").

27 Having reviewed plaintiff's complaint, I find that the  
28 allegations are sufficiently well-pled to establish

1 defendant's liability under section 2511(1)(a). Plaintiff  
2 alleges that it is "the nation's leading direct broadcast  
3 satellite system, delivering over 225 channels of  
4 television and other programming to more than 10 million  
5 homes and businesses in the United States." Compl., ¶ 1.  
6 Defendant allegedly "purchased and used illegally modified  
7 DIRECTV Access Cards and other devices ('Pirate Access  
8 Devices') that are designed to permit viewing of DIRECTV's  
9 television programming without authorization by or payment  
10 to DIRECTV." Compl., ¶ 10. In addition, plaintiff claims  
11 that defendant "intentionally intercepted, endeavored to  
12 intercept, or procured other persons to intercept or  
13 endeavor to intercept, DIRECTV's satellite transmission of  
14 television programming, in violation of 18 U.S.C. §  
15 2511(1)(a)." Compl., ¶ 25. Upon default these well-pled  
16 allegations are deemed admitted.

17 The only issue that remains is the determination of  
18 damages. Under section 2520(c)(2) the court may assess as  
19 damages "the greater of (A) the sum of actual damages  
20 suffered by the plaintiff . . . ; or (B) statutory damages  
21 of whichever is the greater of \$100 a day for each day of  
22 violation or \$10,000." 18 U.S.C. § 2520(c)(2). The court  
23 has discretion under section 2520 to award damages as  
24 authorized by the statute or to award no damages at all.

25 In re DIRECTV, Inc., 2004 WL 2645971 at \*11; DIRECTV v.  
26 Brown, 371 F.3d 814, 818 (11th Cir. 2004); Dorris v.  
27 Absher, 179 F.3d 420, 429-30 (6th Cir. 1999) (citing  
28 Reynolds v. Spears, 93 F.3d 428, 435 (8th Cir. 1996)).

However, the court may not award an amount falling between those two choices. In re DIRECTV, Inc., 2004 WL 2645971 at \*16; DIRECTV v. Hedger, No. 03-CV-733, 2004 WL 1396274 at \*2 (W.D. Mich. Apr. 20, 2004).

Having alleged that defendant purchased two Pirate Access Devices, plaintiff seeks \$20,000 in statutory damages, \$10,000 per device.<sup>2</sup> I recommend awarding \$10,000 in statutory damages for a single violation of section 2520. See Smoot v. United Transp. Union, 246 F.3d 633, 646 (6th Cir. 2001) ("The \$10,000 liquidated damages amount under § 2520(c)(2)(B) is designed to compensate a claimant for all of the transgressor's misdeeds under the Act, unless that transgressor has violated the Act on more than one hundred separate days, in which case compensation is \$100 for each such day."); DIRECTV, Inc. v. Bloniarz, 336 F. Supp. 2d 723, 727 (W.D. Mich. 2004) (rejecting DIRECTV's "per-device" damage calculations). Section 2511 criminalizes intercepting or attempting to intercept any wire, oral, or electronic communication. 18 U.S.C. § 2511(1)(a). Plaintiff has alleged only that defendant

<sup>2</sup> In its motion for default judgment, plaintiff suggests that it would be entitled to damages under section 2520 at \$100 for each day of the violation, were it to have requested such damages. Plaintiff estimates that defendant used the device for 1,425 days, and on this basis, contends that it would be entitled to \$142,500.00. The duration of violation alleged by plaintiff is based on the number of days between the date that defendant purchased the devices and the date that plaintiff developed a technique to circumvent these devices. Plaintiff has not proven that defendant intercepted the signal for 1,425 days. Therefore, any award of damages on a *per diem* basis would be purely speculative and not warranted under Federal Rule of Civil Procedure 55.

1 possessed two devices, not that he committed multiple  
 2 violations of the statute.<sup>3</sup> See Compl., ¶¶ 17, 25. At the  
 3 hearing, plaintiff also conceded that defendant likely used  
 4 the two devices in tandem, rather than to intercept  
 5 multiple signals.<sup>4</sup> Having reviewed plaintiff's application  
 6 and supporting declarations, I recommend that plaintiff  
 7 recover statutory damages in the amount of \$10,000 against  
 8 defendant Grosman and post-judgment interest thereon  
 9 pursuant to 28 U.S.C. section 1961.

10 Plaintiff also seeks \$2,180.42 in attorneys' fees for  
 11 time expended on this case, under 47 U.S.C. section  
 12 605(e)(4) and 18 U.S.C. section 2520(b)(3).<sup>5</sup> Attorneys'  
 13 fees and costs are recoverable under section 2520. 18  
 14 U.S.C. § 2520(b)(3). In support of its request, plaintiff

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16       <sup>3</sup> Another section of the ECPA criminalizes  
 17 possession of such devices, under which Judge Ware found no  
 18 private right of action exists. See 18 U.S.C. § 2512  
 19 (criminalizing possession of any device that is primarily  
 useful for "the purpose of the surreptitious interception of  
 wire, oral, or electronic communications"); In re DIRECTV,  
Inc., 2004 WL 2645971 at \*8.

20       <sup>4</sup> At the hearing I granted plaintiff leave to submit  
 21 authority stating that use of two access devices in tandem  
 22 constitutes two separate violations of the ECPA. Plaintiff  
 23 submitted a supplemental memorandum citing no such  
 24 authority. Further, the description in plaintiff's  
 memorandum of the devices defendant possessed is consistent  
 with tandem use. I do not consider plaintiff's supplemental  
 memorandum and declaration to the extent that they concern  
 additional issues which I did not grant leave to address.

25       <sup>5</sup> I do not consider plaintiff's request for fees  
 26 under 47 U.S.C. section 605(e)(4) because plaintiff has not  
 27 alleged a violation of this provision against defendant in  
 28 its complaint. Counsel conceded at the hearing that an  
 award under section 605(e)(4) would be inappropriate in this  
 instance. See Fed. R. Civ. P. 54(c).

1 submitted time records demonstrating that it reasonably  
2 incurred \$1,475.42 in attorneys' fees for time expended in  
3 this case prior to the hearing. Colombo Decl. ¶¶ 11-12,  
4 Ex. E. The hourly rates charged by plaintiff's counsel are  
5 reasonable. See Colombo Decl. ¶ 9, Ex. E. I recommend  
6 plaintiff receive attorneys' fees for an additional 1.5  
7 hours of work preparing for and attending the hearing,  
8 which lasted approximately fifteen minutes. Based on  
9 counsel's hourly rate, this amounts to an additional  
10 \$352.50 in attorneys' fees. I therefore recommend that  
11 plaintiff recover a total of \$1,827.92 in attorneys' fees.

12 For the foregoing reasons, I **RECOMMEND** that judgment  
13 be entered in the amount of \$11,827.92 against defendant  
14 Grosman pursuant to 18 U.S.C. section 2520 and that post-  
15 judgment interest be awarded thereon, pursuant to 28 U.S.C.  
16 section 1961.

17 Dated: February 25, 2005

18 /s/ Bernard Zimmerman

19 Bernard Zimmerman  
United States Magistrate Judge

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